

# **EXHIBIT A**

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1 IN RE: )  
 2 CITY OF LIVONIA EMPLOYEES' )  
 3 RETIREMENT SYSTEM, )  
 4 )  
 5 -and- ) No. 12-1899  
 6 )  
 7 BOEING COMPANY, W. JAMES )  
 8 MCNERNEY, JR., and SCOTT E. )  
 9 CARSON, )

ORIGINAL

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15  
 16 BEFORE:

17 William J. Bauer, Circuit Judge  
 18 Richard A. Posner, Circuit Judge  
 19 Diane S. Sykes, Circuit Judge  
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1       PRESENT:

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1 HONORABLE POSNER: First case, City of Livonia  
2 Employees' Retirement Fund vs. Boeing.

3 Mr. Isaacson.

4 MR. ISAACSON: Good morning, your Honor. May it  
5 please the Court. I'm Eric Isaacson representing the  
6 City of Livonia Retirement Fund as lead plaintiff in  
7 this securities fraud class action concerning the  
8 statements that Boeing Company made about the  
9 Dreamliner 787 back in May and June of 2009.

10 The central question presented by the  
11 appeal is whether the complaint states facts that raise  
12 a strong inference of the defendants scienter with  
13 respect to those statements. That means that it has to  
14 plead facts that make the defendants' knowledge of  
15 falsity or recklessness with respect to the falsity or  
16 false or misleading character of their statements at  
17 least as strong as any opposing inference.

18 I think that the inference on the facts  
19 that are pleaded is quite compelling.

20 HONORABLE POSNER: Why didn't a lawyer talk to  
21 Singh?

22 MR. ISAACSON: Well --

23 HONORABLE POSNER: Your whole case --

24 MR. ISAACSON: Well, for a number of reasons, your

1 Honor.

2 Singh was not available at the time that  
3 the initial complaint in the case was filed. The case  
4 was filed in November --

5 HONORABLE POSNER: I mean after the investigator  
6 reports on him, why didn't a lawyer talk to him?

7 MR. ISAACSON: Because Singh didn't want to  
8 cooperate further.

9 Mr. Singh was terminated at Boeing on  
10 January 15th, 20 --

11 HONORABLE POSNER: When did she turn in her report  
12 to you?

13 MR. ISAACSON: She sent the report to us on  
14 February 21st.

15 We were subject to the Court's order  
16 when we were appointed on January 15th as lead  
17 plaintiff to file an amended complaint by  
18 February 22nd, so we were finalizing the complaint for  
19 filing on the 22nd when we received the email on the  
20 21st.

21 We immediately evaluated what was in  
22 that email, made the decision that we probably should  
23 follow up further with Singh and include some  
24 allegations concerning Singh. In a further amended

1 complaint --

2 HONORABLE POSNER: And when was it that you could  
3 no longer talk to Singh, he wouldn't talk to you  
4 anymore?

5 MR. ISAACSON: In April.

6 HONORABLE POSNER: Well, between February and  
7 April, why didn't you -- why didn't you speak to him  
8 before you filed your complaint -- well, maybe -- you  
9 had to file on the 22nd, but why didn't you speak to  
10 him as soon as you could?

11 MR. ISAACSON: Well, we had to file the  
12 complaint -- amended complaint on the 22nd of February.  
13 We're getting to the end of February. We start  
14 evaluating the information that we had gotten from  
15 Singh --

16 HONORABLE POSNER: How could you evaluate it  
17 without a lawyer talking to him?

18 MR. ISAACSON: We could evaluate what our  
19 investigator had told us. The Supreme Court is --

20 HONORABLE POSNER: Why didn't you want -- this is  
21 your key guy, why didn't you want to talk to him?

22 MR. ISAACSON: Your Honor, the fact that we sent  
23 the investigator back to contact Singh to see if we  
24 could talk with him in April --

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1 HONORABLE POSNER: I don't understand. We're in  
2 February, February 21st, you got this report. You  
3 should realize this is key, you have to have something  
4 more than what you had without Singh, so why wouldn't  
5 you want to talk to Singh forthwith?

6 MR. ISAACSON: Well, we filed an amended complaint  
7 on the 22nd. We went to go talk with Singh in April,  
8 he won't talk with us --

9 HONORABLE POSNER: Why the interval between  
10 February 22nd and April?

11 MR. ISAACSON: Because it's a firm that has a lot  
12 of cases and a lot of work to do and is following up a  
13 lot of leads. It's not like Singh is the only part of  
14 the investigation that's going on in this case and it's  
15 not like it's the only case that the lawyers have.

16 We typically rely on investigators to  
17 develop initial leads and then to follow up --

18 HONORABLE POSNER: At what point do you talk to  
19 the person whom the investigators interviewed?

20 MR. ISAACSON: Well, here it would have been in  
21 April, quite frankly, and then it's in May after Singh  
22 will not speak to us that we end up, I think on  
23 May 20th, seeking leave to file the amended complaint  
24 with the facts that were obtained from Singh that were

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1 corroborated by what was in the public record. It was  
2 corroborated by what Boeing itself had said on  
3 June 23rd when it said that they had known for weeks --

4 HONORABLE POSNER: The problem you have with Singh  
5 is he wasn't employed by Boeing, right?

6 MR. ISAACSON: He was employed by Infotech, but  
7 with a contract --

8 HONORABLE POSNER: Don't fence with me.

9 I asked you. He's not employed by  
10 Boeing; is that correct?

11 MR. ISAACSON: As a matter of labor law, he was  
12 not employed by Boeing.

13 HONORABLE POSNER: What do you mean it's a matter  
14 of labor law? He's not an employee of Boeing?

15 Just say yes or no.

16 MR. ISAACSON: He's not an employee of Boeing.

17 HONORABLE POSNER: Okay. Not an employee of  
18 Boeing.

19 What is the likelihood that Boeing would  
20 give access to its trade secrets to a nonemployee?

21 MR. ISAACSON: You have a stress engineer working  
22 on the midbody section of the plane who appeared to  
23 have access to those facts. He knew the details and  
24 provided considerable detail in his description of it.

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1 It was in the midbody section, the plane -- midbody  
2 integration section that he's working on, the plane's  
3 wings attach to that part of the plane, and Boeing  
4 itself in its public statements said this is a very  
5 complex area.

6 HONORABLE POSNER: My impression is that you think  
7 he had access to much more than just, you know, the  
8 engineering drawings or engineering analyses just of  
9 that single -- the single issue, those stringers on the  
10 wing assembly.

11 MR. ISAACSON: Well --

12 HONORABLE POSNER: Can you assert that he had  
13 access to more extensive files of Boeing?

14 MR. ISAACSON: We asserted what he told our  
15 investigator. His online resume indicated that he was  
16 a Boeing chief engineer. He had a bio online with  
17 Sheffield University that said that he was a chief  
18 engineering with Boeing working on the Dreamliner 787-8  
19 and -9. We thought that we had sufficient  
20 corroboration of his position in the company. It's  
21 only after we identified him or volunteered his  
22 identity to Boeing that --

23 HONORABLE POSNER: No, that's not my question.  
24 You know now that he's not an employee of Boeing, never

1 an employee of Boeing.

2 How likely is -- how extensive access to  
3 a company's files will a nonemployee be given?

4 MR. ISAACSON: I am not in Boeing, so I can't say  
5 that I know that.

6 HONORABLE POSNER: Well, you could ask Boeing,  
7 right?

8 MR. ISAACSON: Well, that would be in discovery,  
9 and it would be nice if we could take some depositions.  
10 We haven't taken any depositions here, your Honor.

11 HONORABLE POSNER: Did you ask the judge to let  
12 you have, by analogy to Twombly Iqbal, to allow you to  
13 have some preliminary discovery to enable you to file a  
14 complaint that might withstand 12(b)(6)?

15 MR. ISAACSON: We opposed their motion citing rule  
16 12(d) --

17 HONORABLE POSNER: That's not my question. I  
18 asked you a simple question.

19 Did you seek preliminary discovery to  
20 discover, to learn, whether you might be able to file a  
21 complaint that would withstand a motion to dismiss?

22 MR. ISAACSON: No, your Honor. We were already in  
23 discovery at the point that this issue came up, and,  
24 you know, depositions were going to start in May when

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1 the District Court issued its order.

2 We also know for a fact at this point  
3 that Singh was right about many of the details that  
4 somebody outside of the company wouldn't know, but if  
5 you're talking about what we had a reasonable --

6 HONORABLE POSNER: How likely is it that Singh  
7 would know of communications between Boeing employees  
8 and their CEO?

9 MR. ISAACSON: Well, he's working with a midbody  
10 integration team saying -- telling us that he's working  
11 on a wing and midbody integration group to, basically,  
12 do stress analysis, which is exactly what we're talking  
13 about.

14 HONORABLE POSNER: No, but why would he be privy  
15 to emails to the CEO of Boeing?

16 MR. ISAACSON: Because, if -- I'm not certain that  
17 he would be privy to emails as in copied on them, but  
18 that doesn't mean he's not going to see them or know of  
19 them in the course of his work, your Honor.

20 HONORABLE POSNER: Why? Why would he know about  
21 something being sent to the CEO?

22 MR. ISAACSON: Because they need to keep the CEO  
23 in the loop on problems that are as important as  
24 this --

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1 HONORABLE POSNER: They do, but they don't have  
2 to -- they don't have to tell this contractor about  
3 their communications with their -- with the CEO of  
4 their company.

5 MR. ISAACSON: They may not have to tell him, but  
6 it seems to me fairly likely if he's working on the  
7 problem with them, that they will let him know that  
8 they're doing it and --

9 HONORABLE POSNER: That to me is extraordinary.  
10 You mean these people -- these lowdown engineer people,  
11 they must be very reluctant to be sending emails to  
12 their boss, let alone -- to the CEO of the company, let  
13 alone showing them to a contractor. Does that strike  
14 you as odd?

15 MR. ISAACSON: That does not strike me as odd  
16 given what we knew about him at the point that we filed  
17 the second amended complaint that he knew what he was  
18 telling us. He was not telling us at that point that  
19 he was a contractor. At that point he was telling us  
20 that he was a Boeing chief engineer, and that's what  
21 his resume said, which was online, which he apparently  
22 put online shortly after he was terminated, the same  
23 day the City of Livonia Pension System was appointed as  
24 lead plaintiff. It was, you know, further corroborated

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1 by the online bio at Sheffield University website --

2 HONORABLE POSNER: You admit he's not -- that his  
3 biography is phony, right?

4 MR. ISAACSON: Well --

5 HONORABLE POSNER: He wasn't employed by Boeing.  
6 He's not a Boeing chief engineer, he never was.

7 I don't know how that helps your case  
8 that he has a phony resume.

9 MR. ISAACSON: I don't think that it helps our  
10 case that Boeing contends he has a phony resume --

11 HONORABLE POSNER: What do you mean Boeing  
12 contends?

13 MR. ISAACSON: Boeing has presented --

14 HONORABLE POSNER: Boeing contends?

15 Are you really still suggesting that he  
16 is employed by Boeing or was employed?

17 MR. ISAACSON: I think he's probably not,  
18 your Honor. But Boeing presented declarations of their  
19 employees to contradict the complaints and allegations,  
20 and the judge cited those declarations and Mr. Singh's  
21 testimony, which is deposition testimony, saying in her  
22 opinion that a conflict between plaintiff's allegations  
23 and later developed facts had arisen.

24 That's not a basis for dismissing a

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1 complaint under Rule 12(b)(6), that's a basis for  
2 having a hearing on summary judgment after full  
3 discovery that's necessary for summary judgment, your  
4 Honor.

5 I see I'm going into my rebuttal time?

6 HONORABLE POSNER: I have another question.

7 What would Boeing -- suppose Boeing  
8 learns before the Paris Air Show that, you know, they  
9 have the real problem with the wing and they're not  
10 going to be able to fly, so -- and that means that that  
11 first flight, which was scheduled for sometime after  
12 the Paris Air Show is not going -- will have to be  
13 cancelled, suppose they know that, if they know that,  
14 what is the gain to them from concealing that  
15 information until after the Paris Air Show? What do  
16 they -- what do they gain by that?

17 MR. ISAACSON: The Paris Air Show is all about  
18 public relations, and it would have been very bad  
19 public relations to go to the Paris Air Show and say,  
20 We're not ready for first flight like we've been  
21 telling you.

22 HONORABLE POSNER: Why is that any worse than  
23 saying afterwards, Oops, we may have thought at the  
24 Paris Air Show that we were all set for our first

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1 flight but we have to cancel it? Why is that -- why is  
2 that better than telling -- than saying in advance?

3 MR. ISAACSON: For one thing, your customers who  
4 have committed to buy your Dreamliner product will go  
5 over to the booth that Airbus has there and start  
6 talking with them about the competing A350.

7 HONORABLE POSNER: As soon as the announcement is  
8 made after the Paris Air Show, they still can cancel.  
9 It's not as if the Paris Air Show is the deadline for  
10 cancellation.

11 MR. ISAACSON: It's not a deadline for  
12 cancellation.

13 HONORABLE POSNER: We are talking about a couple  
14 of weeks. What do they gain by a couple of weeks of  
15 deception?

16 MR. ISAACSON: It's a question of good press  
17 versus bad press at the Paris Air Show.

18 HONORABLE POSNER: They're not selling to --  
19 they're not selling potato chips to consumers,  
20 they're -- how much does this plane cost?

21 MR. ISAACSON: A lot.

22 HONORABLE POSNER: What's the sales price?

23 MR. ISAACSON: I don't -- I don't have it.

24 HONORABLE POSNER: It's many millions.

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1 MR. ISAACSON: Yes.

2 HONORABLE POSNER: It's tens of millions.

3 So you think the people who buy a plane  
4 for tens of millions of dollars and have a right of  
5 cancellation are not going to cancel because they're  
6 told about this after the Paris Air Show instead of  
7 before the Paris Air Show?

8 MR. ISAACSON: I think that at the margin, if you  
9 might, that's not the major concern. It's a lot like  
10 the Tellabs case --

11 HONORABLE POSNER: I don't believe that. These  
12 people -- we know it's happened recently with  
13 Dreamliner. These companies, if they think there's  
14 something wrong with a plane, they're going to cancel,  
15 and it's going to be the same cost to Boeing whether  
16 this happens two weeks earlier or two weeks later.

17 MR. ISAACSON: In Tellabs, this Court observed --

18 HONORABLE POSNER: Not Tellabs. Talk about this  
19 case.

20 MR. ISAACSON: They may have hoped they would come  
21 up with a fix, your Honor.

22 HONORABLE POSNER: Okay. That's a whole other  
23 weakness of your case.

24 MR. ISAACSON: That's not a good defense.

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1 HONORABLE POSNER: That's a whole other weakness  
2 of your case. If they think this is fixable, if they  
3 think they may be able to make the first flight date,  
4 then fine, they don't have to disclose every  
5 uncertainty that they have, right?

6 MR. ISAACSON: Well, they've said that it's passed  
7 the tests, your Honor --

8 HONORABLE POSNER: No. They said the tests were  
9 complete. That's not the same thing as saying they  
10 passed the tests. The tests were complete.

11 What they didn't say was that the tests  
12 revealed problems that they hoped they could fix but  
13 they're not sure they could fix them, right?

14 MR. ISAACSON: They said all necessary tests for  
15 first -- structural tests for first flight were  
16 complete.

17 HONORABLE POSNER: Yes. But to say that a test is  
18 complete doesn't tell you what the results of the test.  
19 You can -- you know, you can take a Bar exam, you've  
20 completed the test and you flunk, right?

21 MR. ISAACSON: If -- yes, I suppose, but it's  
22 misleading if you --

23 HONORABLE POSNER: I don't understand. You're  
24 supposed to say the tests are incomplete?

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1 MR. ISAACSON: Well, if the test has failed, you  
2 don't put out a press release bragging about how the  
3 initial results are positive and you don't --

4 HONORABLE POSNER: Suppose the tests are  
5 completed -- what do you mean initial results are  
6 positive? They say the test is complete, they think  
7 that there's a chance, you know, a non-negligible  
8 chance that this problem can be solved in time for the  
9 flight. What's this -- why is that fraud?

10 MR. ISAACSON: Because they went to Paris and said  
11 the plane was ready to fly when they were trying to  
12 find a fix for a problem that they knew was serious.

13 HONORABLE POSNER: What do you mean? They said,  
14 Ready to fly, is that a quotation?

15 MR. ISAACSON: They said that they were --  
16 McNerney on May 27th said, It will fly in June. Scott  
17 Carson at the Paris Air Show said they were absolutely  
18 committed to first flight within the next two weeks.  
19 He said, I believe it could fly today, and he said, It  
20 definitely will fly this month. Those are direct  
21 quotes of the defendant Mr. Carson, who certainly was  
22 in the loop on these things. It's hard to believe that  
23 he was not informed about the product that was one of  
24 the company's most important that he had been sent to

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1 Paris to discuss and talk about.

2 They put out a press release saying that  
3 they were beginning to build the first planes for  
4 delivery to customers on June 17th. I think that the  
5 inference that they knew there was a serious problem  
6 that caused these positive statements to be misleading  
7 is an extraordinarily strong one, just like the  
8 inference was strong that Notebaert knew what was going  
9 on and the company was --

10 HONORABLE POSNER: How long was the first flight  
11 delayed?

12 MR. ISAACSON: It was delayed until mid-December  
13 of 2009.

14 HONORABLE POSNER: So six months?

15 MR. ISAACSON: Yeah.

16 HONORABLE SYKES: I need to clarify one  
17 chronological point before you sit down, and that is  
18 that you were aware at the time that the second amended  
19 complaint was filed that the confidential source Singh  
20 was no longer cooperating?

21 MR. ISAACSON: We were aware that he said -- he  
22 told our investigator he did not wish to cooperate  
23 further because he was working on a project with  
24 Boeing. She asked him if he wanted to withdraw any of

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1 the statements that he had made previously, and he  
2 said, No, he did not want to.

3 So given the fact that he did not at  
4 that point wish to repudiate what he had said, given  
5 the fact that he provided enough detail that it seemed  
6 to us that he had access to this information and that  
7 it was corroborated by what the Wall Street Journal  
8 said, that the top executives and engineers both had  
9 known since May of the problems, what the Seattle Times  
10 reported that their supplier of the wings --

11 HONORABLE SYKES: I just asked a chronological  
12 point. You did have that knowledge?

13 MR. ISAACSON: We had the knowledge that he would  
14 not cooperate further, so we would have to go without  
15 having lawyers speak with him if we're going to plead  
16 the complaint with those additional paragraphs, but we  
17 believe --

18 HONORABLE SYKES: That was all my questions.

19 HONORABLE POSNER: Did you ask to be able to  
20 conduct -- to depose him?

21 MR. ISAACSON: No, your Honor. I mean, there was  
22 a deposition after we disclosed his identity. The  
23 defendant's noticed his deposition.

24 HONORABLE POSNER: Wait. I don't understand. You

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1 did not -- when you discovered that he won't cooperate  
2 with you, what steps would you have liked to take?

3 MR. ISAACSON: I would have liked to have found a  
4 further witness who would cooperate or take further  
5 discovery to verify what he had said.

6 HONORABLE POSNER: So you wouldn't have wanted to  
7 do anything more with Singh, you'd drop Singh and look  
8 for someone else, is that what you're saying?

9 MR. ISAACSON: We would continue to develop all  
10 the sources that we could, your Honor.

11 HONORABLE POSNER: But you dropped Singh?

12 MR. ISAACSON: We did not notice Singh's  
13 deposition.

14 HONORABLE SYKES: You did not drop Singh?

15 MR. ISAACSON: Well, we certainly did not notice  
16 his deposition.

17 HONORABLE SYKES: Well --

18 MR. ISAACSON: We identified to the defendants, he  
19 was a party who had some knowledge of what was going  
20 on.

21 HONORABLE SYKES: The sole difference between the  
22 iteration of the complaint that had preceded this one  
23 are the Singh allegations, so you did not drop him  
24 despite knowing that he was no longer cooperating?

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1 MR. ISAACSON: We did not drop him from the  
2 complaint that we then filed, that didn't mean that he  
3 wasn't going to be deposed. We were pretty certain  
4 that he was going to be deposed. We told the  
5 defendants who he was on August 30 before they served  
6 any discovery on the point.

7 HONORABLE POSNER: But what could you do with  
8 Singh at a trial?

9 MR. ISAACSON: With Singh at a trial would depend  
10 on what he would be saying at that point. Right now --  
11 right now I don't think that anyone would be wanting to  
12 call Singh at a trial.

13 HONORABLE POSNER: But you didn't want to nail him  
14 down in a deposition?

15 MR. ISAACSON: Well, we did nail him down in a  
16 deposition. In the deposition we pointed out that his  
17 resume said he was a Boeing chief engineer. We pointed  
18 out that his resume said he worked on the 787-8 and  
19 787-9. He said, Oh, those are typos. My resume has  
20 hundreds of typos. I'm not responsible for the  
21 contents of my resume.

22 HONORABLE POSNER: So what would you do at a trial  
23 with Singh?

24 MR. ISAACSON: We probably would not be doing much

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1 at a trial with Singh, your Honor.

2 HONORABLE POSNER: Okay. Well, thank you very  
3 much. I'll give you more time, Mr. Isaacson.

4 MR. ISAACSON: Thank you very much, your Honor.

5 HONORABLE POSNER: Mr. Wolff.

6 MR. WOLFF: Good morning, your Honor. May it  
7 please the Court. I'm Eric Wolff, counsel for the  
8 defendants in this case.

9 Your Honor, this case is about  
10 plaintiff's fundamental and material  
11 misrepresentations, and those misrepresentations were  
12 made directly to the Court and they were about Singh's  
13 being in a position to know and that he had firsthand  
14 access to internal Boeing documents, including emails  
15 to the CEO. Those were the District Court words,  
16 fundamental misrepresentations; material  
17 misrepresentations directly to the Court, and those  
18 were unquestionably the reason the first -- the second  
19 amended complaint was not dismissed, and the District  
20 Court was very clear about that, but the  
21 misrepresentations were not just on the face of those  
22 allegations, they were statements made in briefing and  
23 in open court.

24 Confidential sources are troubling, and

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1 this Court and others have struggled with the PSLRA and  
2 how do you assess these confidential sources.

3 What's really notable about this case is  
4 they only had one, only one. Not 26 or 5 like other  
5 notable cases in this Circuit. The way they got over  
6 the hurdle was that they vouched to the District Court,  
7 they really vouched to the District Court and they  
8 assured the District Court that they had -- and this is  
9 their own words, and as Mr. Isaacson discussed, this is  
10 about someone they never met and who was no longer  
11 going to have any contact with them and really nothing  
12 had changed since that February meeting, they just went  
13 back and said, Will you confirm this, but having never  
14 met him, when it came time to defend the second amended  
15 complaint, they filed a brief and twice in that brief  
16 they said, This is smoking gun evidence, that was a  
17 direct quote. We should be able to survive on one  
18 source because it's a smoking gun source.

19 And then there was a hearing later in  
20 the case where they stood up, again, speaking about a  
21 witness they've never met, and they said directly to  
22 the Court as the Court is exploring is this person  
23 enough, they said, He's seen the documents, he's seen  
24 the documents. They said that in open court. There

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1 was no basis for saying that.

2           They also said at the same hearing,  
3 given the way they had alleged things and the wing  
4 integration team and mentioning various Boeing vice  
5 presidents, or, actually, just one, they got one wrong,  
6 the District Judge observed to Boeing, I'm surprised  
7 given the specificity of the allegations that you don't  
8 know who this is, clearly thinking that this is  
9 somebody fairly high up that given the description  
10 Boeing would know who this would be, and plaintiffs,  
11 again, having never met this person, having  
12 corroborated nothing he said told the District Court in  
13 open court, We believe they know who it is. We believe  
14 based on the allegations that they know who this is.  
15 Basically confirming the Judge's misperception that  
16 this is somebody fairly high-ranking.

17           And, finally -- and this was a fairly  
18 pernicious inference that was drawn.

19           Once Singh's name was revealed and  
20 within 24 hours on the defense side, all we can think  
21 is, This has been a fraud on the Court. It is -- the  
22 allegations are nowhere close to who this person is.  
23 It's all wrong. He's not who they say he is. He  
24 hasn't seen what they said he had seen. It is

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1 extremely implausible, even on the face of it, but if  
2 you believe he's a very high ranking person, then it  
3 becomes more plausible.

4 We filed declarations, they're in the  
5 record. One of them, your Honor, is by Mr. O'Grady at  
6 Boeing, it talks all about the access to emails on the  
7 side-of-body and how restricted that is, and there's a  
8 person who keeps a list and there's special ID badges  
9 and everything, and the notion that Singh had access to  
10 that is absurd.

11 And, in fact, the Boeing engineers who  
12 sat on top of the project that he was on, which had  
13 nothing to do with the side-of-body joint, it had to do  
14 with this aerodynamic piece that connects the frame to  
15 the wing, nothing to do with the side-of-body joint,  
16 but even those somewhat senior Boeing engineers, they  
17 note, this is in the Mustafa declaration and the  
18 Rossman declaration and the Meyer declaration, these  
19 are all in the appendix, they note that they didn't  
20 have access to any of that. They don't know why they  
21 would ever need it. So the access was exactly as  
22 restricted as your question suggested.

23 But we filed those declarations to tell  
24 the Court, This -- they have misled you. They have

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1 misled you. What they stood up in court and told you,  
2 all this stuff about smoking gun evidence, they have  
3 misled you. And the brief that plaintiff's filed in  
4 response, the lead argument of that brief was, How can  
5 Boeing say this, they haven't even deposed him. They  
6 haven't even noticed his deposition. That is in bold  
7 italics in their brief, Boeing hasn't even noticed his  
8 deposition. Clearly implying to the District Court,  
9 We're not afraid of a deposition and we think this  
10 person will go to a deposition and say the things we  
11 pleaded. Even though they've never met him, never had  
12 any contact with him for months. He's part of a  
13 central dispute in the case, they don't reach out to  
14 him. The first time any attorney in the case had any  
15 contact with Singh was when he responded to Boeing's  
16 subpoena, didn't know what to do, he went to the  
17 offices of Perkins Coie in Seattle because that was the  
18 return address, and he had a few documents and he had  
19 an annotated subpoena, and that's all in the record  
20 under the affidavit of Steve Koh. That was the first  
21 time that any attorney met with him.

22 Then Boeing did a declaration with him  
23 and noticed his deposition, and in working on the  
24 declaration, that was the first time he had ever seen

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1 the complaint, even though plaintiffs had said to the  
2 District Court, we went back to the source. And in  
3 their briefing, it is -- it is coy, in the briefing you  
4 will find expressions like, Plaintiff's lawyers and  
5 their investigator interviewed the sources, muddying up  
6 just who is doing what. There's lots of references to  
7 just plaintiffs, Plaintiffs twice confirmed with the  
8 source the information that was provided.

9 Well, it was when Boeing worked on his  
10 declaration, that was the first time that he had ever  
11 seen the complaint.

12 And then his deposition -- in his  
13 deposition he made abundantly clear through a day's  
14 worth of enormous frustration and anger and eventually  
15 just complete despair, he doesn't know anything. He --  
16 there's no way that he provided the information that  
17 was put into the complaint, he doesn't know anything.

18 But plaintiffs -- after Boeing began the  
19 examination, plaintiffs showed up -- or plaintiffs were  
20 there and they were all over him, and they used the  
21 stuff from the internet and they cross-examined him on  
22 it clearly believing, as your Honor's question  
23 suggested, well, he has phony resumes and you knew they  
24 were phony.

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1                   So we believe the District Court had a  
2                   duty to police the lawyers in the courtroom for the  
3                   misrepresentations made directly to the Court. We  
4                   believe the conduct and the District Court's findings  
5                   about it do warrant sanctions.

6                   HONORABLE POSNER: Well, Mr. Isaacson said at the  
7                   very end of his argument he was quoting Boeing  
8                   officials as saying that the plane would fly on  
9                   schedule.

10                  MR. WOLFF: So he quoted statements from the Paris  
11                  Air Show, and there's a very important distinction that  
12                  needs to be understood about first flight and the  
13                  reason that everything was delayed.

14                         The plane was not delayed -- first  
15                         flight wasn't delayed because the plane couldn't fly,  
16                         and so when Scott Carson is at the Paris Air Show and  
17                         says, I personally believe the plane can fly today, and  
18                         statements of that nature, if you're just talking about  
19                         a ceremonial first flight or something like that, then  
20                         the plane can fly.

21                         The problems in testing occur at  
22                         105 percent of the design limit load, which the design  
23                         limit load is the maximum load that any one plane in  
24                         service of all the planes out there flying, that any

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1 one plane would experience in its entire life, so it's  
2 meant to be something really, really bad, a storm,  
3 something of that nature. That's where the problems  
4 are showing up. Okay. First flight is nothing like  
5 that. First flight is a very simple flight, wheels  
6 down the whole time. So, if you're just talking about  
7 that, the plane can fly.

8 The reason it gets delayed and the  
9 reason there was all this analysis and what they're  
10 trying to figure out, they're analyzing the loads and  
11 then they're looking at what kind of loads do you need  
12 to do a productive flight test. Flight test is  
13 harrowing. Flight test is stall, it's -- they do  
14 flutter testing where they get the wings bouncing up  
15 and down, they have all kind of things they need to do  
16 on a flight test --

17 HONORABLE BAUER: I didn't know that's how planes  
18 flew.

19 MR. WOLFF: It's scary.

20 That's what they're analyzing. That's  
21 what they need to understand. And they're -- the  
22 conclusion that they reach and the reason it got  
23 delayed was that looking at the strain gauge data,  
24 they're getting results that are not matching their

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1 models and they need to figure that out. They decide  
2 that the plane -- the wing needs a fix.

3 Now, if you -- at that point you're at a  
4 crossroads because if you still think you can do some  
5 flying, you can do some testing and you can test the  
6 systems and whatnot, you can still be productive, but  
7 if it's too restricted, and this is what was announced  
8 on June 23rd, if the flight envelope is too restricted,  
9 then it's just not worth it. Go make the change, get  
10 it set, and then do productive flight testing, do  
11 everything in flight testing that you want to do, and  
12 that's the choice that was made, but that internal  
13 debate within the company, I mean, it's not -- none of  
14 this stuff is as depicted in the complaint or as it was  
15 depicted from the podium, like it's some green  
16 light/red light test. It was a test, Oh, green light,  
17 we passed. It's not like that. They have thousands of  
18 strain gauges on this joint, they have to figure out  
19 what's going on.

20 On May 3rd what was announced was  
21 exactly what your Honor said, The test was complete.  
22 They bent the wing 18 feet up in the air. It was  
23 complete. The initial results were positive. They  
24 didn't see anything initially that was wrong. The data

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1 are still being analyzed. That was the public  
2 announcement. There's nothing false in that  
3 announcement.

4 They went on and there was a different  
5 test, not for first flight, it was on May 22nd. There  
6 was an anomaly near 105 percent of design limit load.  
7 And, by the way, this repeated statement here today and  
8 in their brief that the sealed appendix corroborates  
9 what they pleaded and corroborates a source, that is  
10 absolutely not true, and, in fact, you can go through  
11 the sealed appendix and you'll hear exactly the  
12 story -- you'll see on the original documents exactly  
13 the story I'm telling you, there was an anomaly on a  
14 May 22nd test. It was at 104 percent of design limit  
15 load, not 125 percent, like the complaint says. There  
16 was no failed April test that everyone knew about, they  
17 don't have a single document --

18 HONORABLE SYKES: Counsel, if I can interrupt for  
19 a minute. This whole discussion is sort of getting  
20 into the weeds of the merits of the claim here. It  
21 illustrates the procedural anomalies pursuant to which  
22 this case comes to us.

23 There was a denial -- initial denial of  
24 the motion to dismiss the second amended complaint, the

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1 judge in the ordinary course of deciding that took the  
2 Singh allegations as true and said that they were  
3 enough to cure the deficiencies in the prior iteration  
4 of the complaint and then that opened the discovery  
5 spigot, and so now we have a more developed factual  
6 record, but what we really still have before us is a  
7 motion to dismiss that's supposed to be decided on the  
8 pleadings, and I don't know how you propose to resolve  
9 that. The way this all unfolded was somewhat  
10 unorthodox.

11 MR. WOLFF: Yes, it was.

12 Well, let me speak directly to the  
13 procedural issue. I only talk about the sealed  
14 appendix because statements were made about what can be  
15 found there that are inaccurate.

16 But on the procedural question, we have  
17 a 12(b)(6), the Judge has to apply the PSLRA, which is  
18 sort of beyond the normal 12(b)(6) standard because you  
19 have to evaluate inferences and competing inferences.  
20 You have the face of the allegations. They are  
21 presented in a way that is ambiguous. He is a Boeing  
22 chief engineer. That's what they say. What does that  
23 mean? That could mean very senior engineer within  
24 Boeing, high ranking insider with lots of access to

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1 emails and things like that or it could mean some  
2 fellow who works for a contractor whom we can find a  
3 resume on the internet where he's calling himself a  
4 Boeing chief engineer. That's your range of inferences  
5 as you decide a 12(b)(6) motion.

6 The judge hears from the lawyers and  
7 plaintiffs tell the judge, These allegations, we want  
8 the highest amount of inferences for our side. They  
9 are, Quote, Smoking gun. They say that twice. They  
10 lead her to believe that when they say Boeing chief  
11 engineer, it's a high ranking insider. Those are the  
12 inferences that the judge brings to deciding the  
13 12(b)(6) motion.

14 With those inferences, if you can get by  
15 with just one confidential source, they would have to  
16 be really strong inferences like that.

17 The judge learns that they  
18 misrepresented those things. The judge learns that  
19 those inferences should not have been drawn, and so  
20 what we ultimately have in the dismissal, and the  
21 District Court described this very well, it's not so  
22 much that she's considering facts, she is correcting  
23 for misrepresentations in court, which is beyond  
24 12(b)(6).

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1 HONORABLE SYKES: As a sanction then are we to  
2 construe this decision as a dismissal of the second  
3 amended complaint as a sanction for fraud on the Court  
4 or as a revisitation of the Rule 12(b)(6) motion or  
5 just what is its core?

6 MR. WOLFF: Well, the order is ambiguous on this,  
7 but any -- there are any number of pathways out. The  
8 Court does say, I can reopen this and reconsider for  
9 three different reasons, and the three that are given  
10 are fraud on the Court, carelessness of counsel,  
11 misperceptions by the Court itself. Those are three  
12 that are given. Any of those will do.

13 In the end what she -- what the Court  
14 has to do, it becomes very, very narrow because the  
15 complaint can only survive if you give maximum weight  
16 to those confidential source allegations and you treat  
17 them as credible and compelling and you believe this is  
18 a high ranking insider. As soon as you take away  
19 almost anything from those allegations, if she had  
20 asked at a hearing, for example, of plaintiff's  
21 counsel, When you say Boeing chief engineer, are you  
22 telling me this is somebody high up in Boeing, like a  
23 vice president, and they had just stepped back and  
24 said, Our investigator has found a resume on the

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1 internet where he has described himself as a chief  
2 engineer, I think at that point, it's over.

3 HONORABLE POSNER: Well, aren't you really saying  
4 the second amended complaint, that's the one we're  
5 talking about, is a fraud and when you get rid of it,  
6 you're back to the first amended complaint, which is  
7 already dismissed, right?

8 MR. WOLFF: Yes, that's exactly right.

9 HONORABLE POSNER: I gather from what Mr. Isaacson  
10 said, maybe he can correct it, there's actually no  
11 factual dispute anymore about Singh. He's not a chief  
12 Boeing engineer and he doesn't provide any help for the  
13 plaintiffs and they don't plan to call him as a witness  
14 or anything like that.

15 So, it's as if the second amended  
16 complaint had never been filed, right? Isn't that --

17 MR. WOLFF: That's all fair, your Honor.

18 HONORABLE POSNER: Okay. Well, thank you,  
19 Mr. Wolff.

20 Mr. Isaacson, we'll give you another  
21 couple of minutes.

22 MR. ISAACSON: Thank you, your Honor.

23 The notion that they were just talking  
24 about, a ceremonial first flight at the Paris Air Show

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1 is not how it was understood. Securities analyst said  
2 it was the biggest news of the day that the Boeing 787  
3 was ready for first flight. Nobody interpreted it as a  
4 ceremonial first flight like the Wright Brothers of,  
5 you know, 59 seconds at Kitty Hawk or something like  
6 that.

7 We put the investigator's affidavit and  
8 notes before the Court in connection with their motions  
9 regarding Mr. Singh --

10 HONORABLE POSNER: You mean the Boeing stock price  
11 jumped on the announcement, is that --

12 MR. ISAACSON: There are instances where the stock  
13 price went up on the statements that the company was  
14 ready for first flight or was going to be flying soon,  
15 and we identified those in several paragraphs.

16 HONORABLE POSNER: What are you seeking in way of  
17 damages?

18 MR. ISAACSON: There's a 10 percent -- 10 to  
19 12 percent stock drop at the end of the class period on  
20 the announcement, your Honor.

21 HONORABLE POSNER: So what are you seeking in  
22 damages?

23 MR. ISAACSON: I'm not certain what the total  
24 amount comes to, your Honor.

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1 HONORABLE POSNER: I'm not asking for certainty.

2 MR. ISAACSON: Probably be hundreds of millions.

3 HONORABLE POSNER: Hundreds of millions?

4 MR. ISAACSON: Yes, your Honor.

5 HONORABLE POSNER: How large is your class?

6 MR. ISAACSON: I don't know the size of the class.  
7 It's a very large company, very actively traded,  
8 your Honor.

9 With respect to getting a deposition of  
10 Mr. Singh before we pleaded the information from him,  
11 we're subject to the PSLRA discovery standard --

12 HONORABLE POSNER: You don't want his deposition,  
13 you said to me he's not going to help you.

14 MR. ISAACSON: At this point I understand that  
15 he's not going to help me.

16 HONORABLE POSNER: So if he's not going to help  
17 you, your second amended complaint is out.

18 MR. ISAACSON: Well, your Honor --

19 HONORABLE POSNER: Look, she dismissed the first  
20 complaint because you didn't have the smoking gun, then  
21 you come back with Singh. Singh the smoking gun, the  
22 smoking gun is -- the smoke has wafted away and there's  
23 no more smoke, no more Singh. Without Singh, why  
24 aren't we back to the first complaint?

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1 MR. ISAACSON: And the brief that we filed argues  
2 that the complaint states a claim even without Singh,  
3 your Honor.

4 HONORABLE POSNER: Well, that's fine. That  
5 simplifies the case, yeah.

6 MR. ISAACSON: Based on --

7 HONORABLE POSNER: These statements here.

8 MR. ISAACSON: Based on the statements from the  
9 defendants themselves and what was reported in the  
10 press, the Wall Street Journal and the Seattle Times,  
11 indicating that they knew in May, their announcement on  
12 June 23rd says that they had the data from the May test  
13 when they went to the Paris Air Show and that they  
14 postponed making a decision until after the Paris Air  
15 Show because the flight wouldn't be robust enough to be  
16 doing serious testing.

17 People at the Paris Air Show did not  
18 know that it was merely a ceremonial flight that was  
19 being talked about. They thought Boeing was talking  
20 about something serious.

21 There has been no fraud on the Court.  
22 We let the District Court know that it was an  
23 investigator that had spoken to Singh. We put in her  
24 affidavit, we put in her notes, we put in her emails to

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1 counsel, and we offered to have her come testify.

2 So, there's no fraud on the Court and no  
3 effort to mislead the judge at all, your Honor.

4 HONORABLE POSNER: Well, thank you very much to  
5 both counsel.

6 We'll move on to our next argument.

7 (Which were all the proceedings had  
8 in the above-entitled case.)  
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1 STATE OF ILLINOIS )  
2 ) SS:  
3 COUNTY OF K A N E )

4 I, NICOLE M. BREYTSPRAAK, a Certified  
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6 certify that I transcribed from the audio of the  
7 proceedings had at the hearing aforesaid and that the  
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10 the audio recording and transcribed by me.

11 IN WITNESS WHEREOF, I do hereunto set my hand  
12 at Aurora, Illinois, this 12th day of September, 2013.

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